to incorporate access solutions as new technologies make these solutions possible. With respect to individuals who are deaf or hard of hearing, these obligations should require that all audible information, such as speech, cues, beeps, tones, or warnings are also provided in visual formats. Stated otherwise, individuals with hearing disabilities must be able to control the functions and features of a product or network service through an interface which does not require hearing or voice, and must be able to access the information which is available through that product or service in a visual or textual format. Care must also be taken to ensure that the transition from analog to digital technologies do not strip or impede visual or textual cues, such as closed captioning, that will be needed to provide access to these technologies in the future. Finally, in setting forth specific service or process rules, the FCC should require that where separate or adaptive products or services must be provided to achieve access, individuals with disabilities should not be required to pay charges which are greater than the charges for functionally equivalent products and services that do not require these adaptive features.[8]

The FCC asks whether a manufacturer or service provider must ensure that each of its telecommunications equipment, CPE, or service offerings are accessible, or whether the covered entity may instead be able to demonstrate that some of its equipment or services are accessible for some disabilities if other offerings are accessible to persons with other disabilities. NOI ¶22. Insofar as Section 255 generally requires manufacturers and telecommunications providers to ensure that their equipment and services are designed to be accessible to and usable by individuals with disabilities if readily achievable, we see no room for an interpretation that would allow these

[8] This is the standard applied with respect to telecommunications relay services, which seek to provide telephone services to TTY users that are functionally equivalent to voice-to-voice telephone services. 47 U.S.C. §225(d)(1)(D).

entities to make one portion of their product or service lines accessible for one type of disability and another line accessible for a different disability. Rather, Section 255 dictates that a manufacturer or service provider must first attempt to make a given product or service accessible for as many disabilities as possible, if doing so is readily achievable. It is only after a manufacturer or provider can demonstrate that access is not readily achievable for given disabilities, that it can be relieved of the obligation to provide access for those disabilities. It is then incumbent upon the covered entity to ensure compatibility with peripheral devices or SCPE for those disabilities, if readily achievable.

VI. The ADA Offers Guidance with Respect to the Readily Achievable Standard

A. Section 255 Mandates Case by Case Determinations.

The Commission seeks guidance on the factors which should be used to define "readily achievable" in its implementation of Section 255 of the Telecommunications Act. NOI ¶¶15-16. The factors set forth in the ADA's definition, incorporated by reference in Section 255, clarify that a readily achievable analysis will necessarily balance the nature and cost of an accessibility solution with the overall financial resources and type of operation of a telecommunications provider or manufacturer. Most importantly, this analysis must be performed on a case by case basis. Indeed, in its analysis of the readily achievable standard under Title III of the ADA, the Department of Justice (DOJ) made this point in the preamble to its regulations. In response to a request that it establish a numerical formula for determining whether an action is readily achievable, DOJ declined, and explained as follows:

> It would be difficult to devise a specific ceiling on compliance costs that would take into account the vast diversity of enterprises covered by the ADA's public accommodations requirements and the economic situation that any particular entity would find itself in at

any moment. The final rule, therefore, implements the flexible case-by-case approach chosen by Congress.

Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35544 at 35554 (July 26, 1991). For the very same reasons, it would be inappropriate for the Commission to categorically exempt small businesses or any other entities from the accessibility requirements of the Telecommunications Act. See NOI ¶33. Nothing in Section 255 permits a blanket exemption for such businesses. As noted above, having been patterned after Title III of the Americans with Disabilities Act, Section 255 employs a case by case analysis which weighs the resources of the telecommunications company with the cost of access, to determine whether a particular product or service must be made accessible under the Act.

B. The Resources of Parent Corporations Must be Considered.

The FCC seeks comments on whether the "overall financial resources of an entity" covered by Section 255 require consideration of the entire operations and resources of parent corporations and their subsidiaries. NOI ¶19. Once again, we refer to the DOJ's analysis of the readily achievable standard, as contained in the preamble to its Title III regulations, for guidance.

In it analysis under Title III, the DOJ explained that a readily achievable analysis must take into account the fact that some facilities may be owned or operated by parent corporations or entities that conduct operations at various sites. With respect to subsidiaries, the DOJ stated that, at times, "resources beyond those of the local facility where the barrier must be removed may be relevant in determining whether an action is readily achievable." 56 Fed. Reg. At 35554. The DOJ concluded that "the overall resources, size, and operations of the parent corporation or

entity should be considered to the extent appropriate in light of the 'geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity." Id.

Recent years have witnessed a significant amount of activity with respect to the merger of various telecommunications companies and the division of those companies into separate and smaller subsidiaries. The ADA's readily achievable standard, to be applied to Section 255, makes clear that to the extent that a covered telecommunications entity is a subsidiary of a parent company with whom it maintains a close geographic, administrative, or fiscal connection, the resources of that parent company must be considered in determining whether a particular access solution is readily achievable.

C. Companies Have An Ongoing Obligation to Incorporate Access Solutions.

The Commission appropriately states that the rapid pace of market and technological developments means that what may not be readily achievable today may, in fact, become a readily achievable access solution with the onset of new technology. For this very reason, evidence submitted by a telecommunications manufacturer or service provider that it is unable to achieve access with respect to a specific disability at a given point in time should not relieve that entity of its responsibility to adopt new features to achieve access as technology develops. Rather, it is critical for telecommunications manufacturers and providers to have an ongoing obligation to incorporate access solutions into the redesign of their product and service lines as these features become readily achievable.[9]

[9] Insofar as telecommunications products and services tend to have short "shelf" lives, this ongoing obligation should not prove to be burdensome to the telecommunications industry. In any event, the NAD understands that the ongoing obligation to redesign a product or service with

D. Telecommunications Access Presents Different Considerations.

Although the ADA's analysis of the readily achievable standard should prove to be of significant assistance to the FCC in its effort to define this standard for Section 255, there are two differences between the application of this standard as it has been applied under Title III of the ADA and as it will be applied under the Telecommunications Act. First, the readily achievable standard under Title III applies to existing buildings and structures. Such access typically does not involve issues of technical feasibility. In the telecommunications setting, however, a manufacturer or provider might allege that providing access for a particular telecommunications product or service will be technologically infeasible. Where this is alleged, the manufacturer or provider should be relieved of the obligation to provide such access only if it provides documentation that it has engaged in comprehensive efforts to overcome the technical problems at hand.[10] An exemption of this type should only be granted on a case by case basis.

Secondly, access to existing buildings and structures, as required under Title III of the ADA, frequently requires the expensive retrofitting of those structures (e.g. the installation of elevators or the widening of aisles or hallways). Although it may sometimes be difficult to demonstrate that the costs of providing retrofits to an existing structure are readily achievable, it must be remembered that the requirements under Section 255 will apply to new products and

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an access solution should take into account sufficient "lead time" for the redesign and redistribution of that product or service.

[10] A similar regulatory process was used by the FCC with respect to the handling of coin sent-paid relay calls. In early proceedings on this issue, telecommunications providers had argued that the handling of such calls was technically infeasible and should not be required by the FCC. The Commission initially rejected this defense as lacking evidentiary support, and only agreed to suspend the requirement to handle these calls after the industry had provided clear documentation that its research and development on this issue failed to produce a technical solution which would be feasible.

services as well. Determinations as to whether it is readily achievable to make a new product or service accessible must be made at the design stage. A company that has failed to employ a disability assessment at this early stage should not be permitted to later argue that retrofitting is not readily achievable. Rather, the test of compliance with Section 255 must be whether it would have been readily achievable for that company to have incorporated access (or compatibility) in the design and development of its product or service, not whether it is readily achievable to modify the product or service once it has been manufactured or deployed.

VII. Service Providers and Manufacturers Should be Individually Responsible and Liable for Compliance with the Accessibility Mandates of Section 255

The FCC seeks guidance on the relationship between the legal obligations of service providers and equipment manufacturers, NOI ¶39, as well as the extent to which responsibility for complying with Section 255 should be apportioned among various companies involved in the design and manufacture of a single piece of equipment. NOI ¶12.

With respect to service providers vis-a-vis manufacturers, each must be held accountable for contributing to the accessibility of a particular service or product. Because Section 255 applies equally to service providers and manufacturers, each must be separately and jointly responsible for implementing the solutions necessary to achieve access. Conversely, each or both should be held liable for fines, damages, or other penalties for the failure to make their services or products or service accessible, depending on the efforts each took to adopt access features.

With respect to the application of Section 255 to situations where there is more than one manufacturer of a product, or the manufacturer licenses its product to other manufacturers, each manufacturer and licensee should remain individually and jointly liable for the failure of that

product to be accessible, unless otherwise provided by contract. Indeed, it is precisely this approach that was adopted by the Department of Justice with respect to the allocation of responsibility between landlords and tenants covered by Title III. The DOJ concluded that although both the landlord who owns a particular building and the tenant who occupies that building are subject to the accessibility requirements of Title III, each may allocate liability in a contract between them: "Allocation of responsibility as between the parties for taking readily achievable measures to remove barriers and to provide auxiliary aids and services . . . may be determined by the lease or other contractual relationships between the parties." Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. at 35556. Toward this end, the DOJ explained that frequently, leases contain "compliance clauses," which allocate responsibility to a party for compliance with relevant federal, state and local laws. 56 Fed. Reg. at 35555. Similarly, contractual agreements between telecommunications manufacturers and secondary manufacturers or resellers can include clauses to ensure compliance with Section 255.

VIII. All Equipment Marketed or Sold in the United States Should Be Required to Meet the Accessibility Mandates of Section 255

The Commission asks whether manufacturers of telecommunications equipment in other nations should be subject to the same accessibility standards under Section 255 which are applied to domestic manufacturers, or whether the Commission should give weight to the varying standards of other nations. NOI ¶11.

Historically, telecommunications laws requiring access to telecommunications products for individuals with disabilities have not distinguished between domestic and foreign manufacturers.

For example, the Hearing Aid Compatibility Act of 1988 required nearly all telephones manufactured or imported into the United States after August 16, 1989, to be compatible for use with telecoil-equipped hearing aids. 47 U.S.C. §610. Similarly, the Decoder Circuitry Act of 1990 requires all television sets with screens 13 inches or larger to have the ability to display closed captioned television transmissions, whether these televisions are manufactured in or imported into the United States. 47 U.S.C. §§ 303,330. No problems have been reported with respect to the application of each of these laws to foreign manufacturers.

The Commission notes that all equipment marketed or sold in America must meet operational and technical requirements. Such requirements must be met presumably for the effective use of the equipment. Similarly, accessibility requirements are needed for the effective use of equipment by individuals with disabilities. Given the large percentage of telecommunications equipment that is produced in foreign markets, Section 255 would have little meaning were it not applied universally to these markets, as well as to local markets. Just as manufacturers in other nations have had to comply with FCC technical, operational, and previously mandated accessibility requirements (hearing aid compatibility and the decoder chip), so too should they be required to comply with any future accessibility standards promulgated by the FCC or the Access Board. Indeed, this is one more reason that the promulgation of FCC regulations on Section 255 is so critical: only clearly drawn specific and process accessibility standards will enable these manufactures to incorporate universal design into their manufacturing processes so that they can make their products and services accessible to and usable by Americans with disabilities.

IX. Cost Assessments Must Consider the Costs of Failing to Provide Telecommunications Access

The Commission's assessment of the costs of providing access to telecommunications should take into consideration the costs to individuals and society of failing to provide such access. To begin with, time and again, providing access at the design stage has proven to be extraordinarily less expensive than retrofitting for access at a later date. One only has to look at the example of the closed captioning decoder chip to understand this point. Prior to passage of the Television Decoder Chip Act, consumers were forced to purchase separate decoders, at a cost of approximately $250 each. After the Decoder Act mandated that all televisions sets over thirteen inches be equipped with a built-in decoder chip, the cost to consumers virtually disappeared.[11] Similarly, these comments have already discussed the high costs of providing telecommunications relay services as a means of retrofitting our nation's public switched telephone network for TTY access. In addition to the cost of the relay services themselves, consumers who are deaf, hard of hearing, or speech disabled are forced to purchase individual TTYs, at a cost ranging from $200 to $700 each. In addition, deaf-blind individuals must purchase telebrailles to communicate over the telephone, at a cost of $6,000 or more, and individuals who require digital linguistics-based augmentative communications devices must pay as much as $10,000 for those devices. These costs are typically over and above, not in place of,

[11] At the time that the Decoder Act was pending in Congress, it was estimated that the ultimate cost of including a chip in each television set would be around $5.00. Since the effective date of the Act (July 1, 1993), even this minimal cost seems to have become absorbed in the ordinary costs of manufacturing television sets.

the cost of conventional telephones.[12] Thus, not only consumers, but employers, educators, and places of public accommodation are continually required to incur the high costs of purchasing and maintaining TTYs and other adaptive devices where access is not incorporated in the product or service design from the start.

A discussion of costs must also weigh the heavy societal costs of failing to provide telecommunications access for individuals with disabilities. The costs of lost educational and employment opportunities, both for individuals who are denied telecommunications access and for society as a whole, far outweigh any costs that are needed to incorporate access into the initial stages of product and service design. In contrast, ensuring that access needs are considered at these early stages will result in exceptional benefits to society, in the form of increased tax revenues, reduced disability payments, and expanded independent living by all Americans with disabilities.

X. Definitions Applicable to the Enforcement of Section 255

The Commission seeks guidance on a number of terms used in Section 255. The NAD offers the following guidance with respect to some of these definitions:

A. Telecommunications Provider - The NAD urges the Commission to define a telecommunication provider as broadly as possible, and specifically, to adopt the analysis it employed in its First Report and Order on Section 251. In that proceeding, the Commission concluded that "to the extent a carrier is engaged in providing for a fee domestic or international

[12] Although direct-connect TTYs do exist, enabling one to use a TTY without a conventional telephone, more often than not TTY users live or work with individuals who use conventional telephones, and need access to the voice-based network. These individuals must then purchase both a conventional telephone and a TTY for each telephone location in the home or office.

telecommunications, directly to the public or to such classes of users as to be effectively available directly to the public, the carrier falls within the definition of 'telecommunications carrier.'" First Report and Order ¶992. The Commission then used this definition to include all Commercial Mobile Radio Services (CMRS) and Private Mobile Radio Services (PMRS) (to the extent they provide domestic or international telecommunications for a fee directly to the public), within the definition of a telecommunications carrier. Id. At ¶993. Because the Act defines a "telecommunications carrier" as "any provider of telecommunications services," 47 U.S.C. §153(44), NOI ¶8, we submit that the Commission's analysis of the definition of a telecommunications carrier should apply to the definition of a telecommunications service provider, as well, under Section 255. This definition will ensure that an entity which may not have been considered a provider of telecommunications services in the past may nevertheless be considered a provider at some point in the future if it later provides what is considered a telecommunications service. The advantage of using a flexible definition along these lines can be illustrated with the example of Internet providers who are now deploying new technologies to enable the completion of telephone calls via the Internet. Although previously such Internet services were not considered to be telecommunications services, there is little question that their handling of long distance calls is a telephone service and, therefore, should be subject to the access mandates of Section 255.

B. Telecommunications Equipment

The FCC seeks comment on the extent to which equipment that can be used with telecommunications services, but which also can be used with services that are not telecommunications related, is covered under Section 255. NOI ¶9. Section 255 of the

Telecommunications Act requires manufacturers of telecommunications equipment to make their equipment accessible to and usable by individuals with disabilities. 47 U.S.C. 255(b). This Section does not draw a distinction with respect to the intent of the manufacturer; nor does it exempt from coverage equipment which may have additional functions that do not fall within the Act's definition of telecommunications services. It is apparent, then, that to the extent equipment can be used with telecommunications services, it must be defined as telecommunications equipment, even if such equipment can be put to other uses.

The Commission also notes that although consumers have options in the purchase of customer premises equipment,[13] they typically do not have choices with respect to "network or infrastructure hardware," i.e. telecommunications equipment. NOI ¶10. The Commission then asks whether the treatment of these two categories of equipment should be different, and seeks comment on how the duty not to install inaccessible network "features, functions, or capabilities" will affect consumers' options. Id; See also NOI ¶¶26-27..

Although consumers presently do not have much choice with respect to the telecommunications equipment used by a carrier, it is expected that the options for consumers to choose among carriers will multiply in the near future. In any event, carriers have the obligation under Section 251(a)(2) of the Act to ensure that their network features, functions, or capabilities are compatible with the equipment or services used by individuals with disabilities to access a given telecommunications service. Thus, access to a particular telecommunications service not only includes the service itself (e.g., access to caller ID services), but the manner in which an internal facility or piece of equipment may affect access to that service. For example, local loops

[13] Even these options are considerably narrowed for individuals with disabilities.

or switching equipment that would have the undesirable effect of blocking access to an otherwise accessible telecommunications service would be in violation of Section 251(a)(2).

C. Specialized Customer Premises Equipment

The Telecommunications Act requires that where manufacturers or service providers cannot otherwise fulfill the direct access requirements of Section 255, they must ensure that their equipment and services are compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, if doing so is readily achievable. The Commission has requested guidance on the definitions for "specialized customer premises equipment" (SCPE) and "existing peripheral devices," as these terms appear in this mandate. NOI ¶24, 25.

Individuals with disabilities employ a wide range of devices to achieve compatibility with otherwise non-compatible telecommunications products and services. For example, SCPE used by deaf and hard of hearing individuals include, but are by no means limited to, TTYs, flashing light signalers, volume controls, caption decoders, tactile vibrating devices, artificial larynxes, and FM or infrared assistive listening devices. The types and forms of existing peripheral devices is even broader in scope, including, for example, all kinds of computer software, hardware, modems, and keyboards.

It is important that the definition adopted by the FCC take into consideration the fact that a wide range of equipment and devices may be commonly used by persons with disabilities for the purpose of accessing telecommunications equipment and services. While some of these devices are typically telecommunications-related, others may not traditionally be thought of in this sense. For this reason, it is important that the Commission's definition not be too limited, but rather

provide the breadth and flexibility needed to encompass whatever devices are needed, both now and in the future, to facilitate telecommunications access. Along these lines, for guidance, we refer the Commission to the definition of an assistive technology device as used in the Technology-Related Assistance for Individuals with Disabilities Act: "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities." 29 U.S.C. §2201-2217.

XI. Complaint and Enforcement Procedures

We agree with the Commission that individuals have a right under Section 255 to file complaints for violations of that section, in addition to the right to file complaints against common carriers for accessibility violations under Section 208. The reference in Section 255(f) to complaints that may be filed with the Commission support this statutory construction. Moreover, as the Commission points out, Congress clearly intended that the Commission be the enforcing authority over the requirements for access to both telecommunications equipment and services, yet the complaint procedures under Section 208 do not cover manufacturers. The enforcement authority under Section 255 for complaints against manufacturers fills this gap.

Although Congress removed the private right of action with respect to Section 255 for complaints against certain entities covered that under section, consumers still have the right to bring a civil suit with respect to the recovery of damages for accessibility violations by common carriers under Section 207 of the Communications Act. As the Commission points out, this was made clear in the Conference Report's statement that "[t]he remedies available under the Communications Act, including the provisions of sections 207 and 208, are available to enforce

compliance with the provision of section 255." NOI ¶36 n. 29, citing Conf. Rep. No. 104-230 at 135 (104th Cong. 2d. Sess.) (Feb. 1, 1996). In addition, the Commission should make clear that requirements under Section 251(a)(2), not to install network features, functions, or capabilities that do not comply with the accessibility guidelines of Section 255 are enforceable in a court of law under Section 207.

While the NAD does not envision the need for complaint procedures which are separate and apart from other complaint procedures for the enforcement of Section 255, we do urge the Commission to initiate its proceeding to develop complaint processes for the Telecommunications Act as soon as possible. In the interim, the Commission should have procedures in place to accept and review any complaints which report inaccessible products or services. Consumers should be allowed to file such formal complaints in alternate formats and through various mediums, including the Internet, direct-access TTYs, and fax machines.

Finally, it is critical that there be coordination between the DOJ and the FCC in the enforcement of Section 255. The Commission itself notes that there will be situations where a lack of access is the result of a place of public accommodation (e.g. the placement of a telephone), rather than a telecommunications equipment manufacturer or service provider. In those situations, the DOJ may be the proper entity with whom to request enforcement of the ADA's requirements for access. In other situations, however the assignment of liability may not be so clear. For example, is the placement of an outlet for a TTY the responsibility of a place of public accommodation, such as a hotel, or is the manufacturer of the payphone that will be utilizing that outlet responsible for its proper placement? Questions like this will continue to arise, and it is critical that complaints not be volleyed back and forth between the DOJ and the

FCC when each is uncertain of the scope of its jurisdiction. For this reason, we propose that a mechanism be in place for the coordination, referral, and proper handling of such complaints.[14]

XII. Conclusion

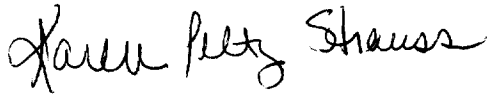
Until recently, most technological innovations in the development of telecommunications equipment and services have ignored the needs of individuals with communications disabilities. Time and again, the market has failed to address and respond to the need for disability access. The failure to consider such communication access needs during the initial stages of service and policy development has, over the decades, created insurmountable communication barriers. There is no better example of this than the telephone itself, which became an indispensable part of an industrialized society for most of America, but which became and remains a tool of isolation for many deaf and hard of hearing individuals.

Increased access to telecommunications services and equipment will be critical to expanding employment, economic, educational, and recreational opportunities for individuals with disabilities. In recent years, the Commission has adopted numerous rules which have demonstrated its commitment to ensuring access to telecommunications. Regulations on telecommunications relay services, hearing aid compatibility, and decoder-equipped televisions have resulted in significant strides toward achieving such universal access. The NAD applauds the Commission for its successful implementation of the statutes behind those rules as well as for taking this first step toward the implementation of Section 255 of the Telecommunications Act. We urge the FCC to continue this trend toward reversing decades of discrimination against

[14] This is similar to arrangements among the U.S. Department of Education, the U.S. Department of Health and Human Services, and the U.S. Department of Justice with respect to civil rights complaints that overlap between the ADA and the Rehabilitation Act of 1973.

individuals with disabilities by promulgating rules that will carry out Congress' intent to ensure equal access to telecommunications services and equipment for all Americans.

Respectfully submitted,



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